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SUPREME COURT OF THE UNITED STATES

January Term, 1981

NO. _____

THE UNITED STATES OF AMERICA,

Versus

MANUEL ANSELMO CHACON, JR., REGINALD CLARK BARRETT, JR., VICTOR MANUEL RIVERA SANTIAGO, SANTIAGO MACHIN GONZALES, GABINO FABIAS, and JOSE LUIS FONTE, Petitioners,

Versus

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Federal prosecution of the Petitioners violate their rights under the Double Jeopardy Clause of the United States Constitution?

2. Does an interlocutory appeal lie from the failure of the United States Government to follow the United States Justice Department's Petite Policy?

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TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioners hereby pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in

the above entitled case on December 15, 1980.

OPINIONS BELOW

The December 15, 1980 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is an unreported summary opinion and is reprinted in the Appendix to the Petition in Appendix A. The prior opinion and judgment of the United States District Court for the District of South Carolina are also unreported and are contained in the record of the United States Court of Appeals for the Fourth Circuit.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit (Appendix A) were entered on December 15, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Federal prosecution of the Petitioners violate their rights under the Double Jeopardy Clause of the United States Constitution?

2. Does an interlocutory appeal lie from the failure of the United States Government to follow the United States Justice Department's Petite Policy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The rights of the Petitioners under the Double Jeopardy Clause of the Fifth Amendment are involved.

The validity of §44-53-410 of the Code of Laws of South Carolina, 1976, is here involved, as it may be in conflict with the actions of the United States Government. That section involves double prosecution under the South Carolina drug laws and reads as follows:

> The Prosecution In Another Jurisdiction Shall Be Bar to Prosecution.
>
> If a violation of this article is a violation of Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State.

STATEMENT OF THE CASE

The Petitioners were originally arrested on or about September 9, 1978, by officers of the Charleston County Police Department and charged with violations of the drug laws of South Carolina. Federal Drug Enforcement Administration officers cooperated in the arrests. The Petitioners were indicted by a Charleston County Grand Jury for conspiracy to import and distribute marihuana.

On November 22, 1978, they appeared in General Sessions Court for Charleston County and pled guilty to the indictment. They were sentenced to two and one-half (2-1/2) years in prison or a fine of $2,500.00, and two (2) years probation, the maximum alternative sentence allowed under South Carolina law.

On March 24, 1979, the Petitioners were indicted by the Grand Jury for the United States District Court for the District of South Carolina on a three count indictment. Count 1 charges them with conspiracy to violate various drug laws of the United States. Count 2 charges them with importation of marihuana. Count 3 charges them with possession of marihuana with intent to distribute.

On June 11, 1979, Petitioners appeared before the Honorble Charles E. Simons, Jr., Judge of the United States District Court for the District of South Carolina, for a hearing on their Motions to Dismiss, which motions were based on their claim that the Federal prosecution violated their rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, among other grounds, and on their Motions to inspect the correspondence, memoranda and other papers between the United States Attorney for the District of South Carolina and the Justice Department concerning the Petite Policy. Judge Simons denied the Petitioners' Motions at the hearing.

A few days later, the Petitioners received notice that Judge Simons had scheduled another hearing on these matters. Whereupon they appeared on June 19, 1979, at which time another hearing was held on these identical issues. Once again Judge Simons denied the Petitoners' Motions.

Notice of Appeal to the United States Court of Appeals for the Fourth Circuit was timely filed, and that appeal followed. On December 15, 1980, that Court issued its Order affirming the Order of the District Court below refusing to dismiss the indictment on Double Jeopardy grounds and dismissing the appeal insofar as it concerned a violation of the Petite Policy. The Court issued this Order on motion of the United States Government for Summary Affirmance.

ARGUMENT IN FAVOR OF GRANTING WRIT

1. DOES THE FEDERAL PROSECUTION OF THE PETITIONERS VIOLATE THEIR RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUION?

This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Since this Court's decisions in Abbate v. United States, 359 U.S. 187 (1959), and Bartkus v. Illinois, 359 U.S. 121

(1959), it has decided a number of cases which involve various aspects of the body of law concerning Double Jeopardy issues. Those cases have seriously eroded the decisions of Abbate and Bartkus; yet this Court has not re-examined those cases in the twenty one (21) years intervening. Petitioners contend that the case herein is an appropriate one for a re-examination of the principals of law embodied in the Double Jeopardy Clause. Further, the South Carolina statute which here would prohibit a state prosection after a Federal prosecution makes these cases inapplicable to the facts at hand.

The principle that an individual should not be subjected to more than one trial for the same offense possessed an ancient and honorable heritage when the Congress of the United States voted to include it in the Bill of Rights. Bartkus v. Illinois, supra, (Black, J., dissenting). That principle is supported by very basic notices of fairness. The resources of an individual, which can never match those of the government, should be concentrated on one effort to establish his or her innocence. Defending against a criminal charge subjects an individual to substantial anxiety and expense. Governments have frequently used multiple prosecutions to harass and punish defendants. The ancient concept of individual liberty embodied in the Douple Jeopardy Clause of the Fifth Amendment was developed to protect citizens from such action by the government.

Yet, in spite of this ancient principle of law, in 1959, this Court held that the Constitution did not prevent either the Federal Government, Abbate v. United States, supra, or a state government, Bartkus v. Illinois, supra, from prosecuting a criminal defendant after the other jurisdiction had previously tried him or her for the same act. These cases were grounded upon the concept of dual sovereigns and the concomitant proposition that each sovereign has its own interest in enforcing its criminal laws and is free to enforce its criminal laws without hindrance from the other.

Petitioners herein contend that the Federal prosecution against them for the same acts for which they were prosecuted by the State of South Carolina violates the principle of Double Jeopardy and that the holdings of Bartkus and Abbate are inapplicable to their case. The Petitioners' argument has three parts.

First, Bartkus and Abbate are not applicable to the case at bar because of a crucial factual difference with which this Court has never dealt. Under South Carolina law, if the Federal Government has prosecuted first, the State cannot proceed. Section 44-53-410 of the Code of Laws of South Carolina, 1976 sets forth a specific prohibition under the drug laws:

> If a violation of this article is a violation of a Federal law or the law of an

> other state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State.

The South Carolina Supreme Court has never interpreted this statute; hence, it stands on its clear, simple wording. South Carolina has specifically waived any dual sovereign doctrine in the area of drug law violations.

The primary basis for this Court's decisions in Bartkus and Abbate was the "undersirable consequences" which would follow if prosecution by one sovereign could bar prosecution by another sovereign. The problem, according to the Court, was that a criminal act might impinge more seriously on the interest of the sovereign attempting the second prosecution. As the Court stated in Abbate:

> ...if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.
>
> * * * * *
>
> Thus unless the federal authorities could somehow

> in sure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions.

359 U. S. at 195. Here, South Carolina has specifically yielded to the Federal Government its interest in prosecution of drug law violations, completely obviating the operative problem presented to the Supreme Court in Abbate, by giving the Federal Government the first option to prosecute. Here, however, the Federal Government, in spite of its knowledge of the Petitioners' arrest, took no action. The Petitoners were arrested by state authorities in early September, 1978. There was no federal arrest, grand jury investigation or indictment. The United States Attorney admittedly sat by to see what South Carolina would do, in spite of Section 44-53-410. Not until some months after the state prosecution had been concluded did a federal grand jury indicte the Petitioners in March, 1979. Thus the actions of the United States Attorney demonstrated no federal interest in prosecution and consequently no difficulty with the situation which troubled the Supreme Court in Abbate. The Federal Government had an option to act first, knowing that South Carolina would then be prohibited from prosecuting. By

deliberately delaying its prosecution, in spite of this statute, the Federal Government waived its right under Bartkus and Abbate to institute double prosecution.

Secondly, at the time this Court decided Bartkus and Abbate, it had held that the Fifth Amendment was not applicable to the states through the Due Process Clause of the Fourteenth Amendment. In fact, that holding was central to the holding of Bartkus and to the concomitant rationale of Abbate. Since those decisions, this Court has reversed itself and applied the Double Jeopardy Clause to the states, thereby seriously undermining the dual sovereign doctrine. Furthermore, this Court has not re-examined that doctrine since this reversal.

Leading up to this reversal, this Court held the Fifth Amendment privilege against self-incrimination applicable to the states. Malloy v. Hogan, 378 U.S. 1 (1964). In a companion case, this Court held that one jurisdiction in our federal system could not compel a witness to give testimony which might incriminate him under the laws of another jurisdiction. Murphy v. Waterfront Commission, 378 U.S. 52 (1964). This decision explicitly overruled a prior contrary decision which was based on the dual sovereign doctrine. Feldman v. U.S., 322 U. S. 487 (1944). Following Malloy and Murphy, this Court held the Double Jeopardy Clause fully applicable to the states through the Fourteenth Amendment. Benton v.

Maryland. 395 U.S. 784 (1968). See also, Waller v. Florida, 397 U.S. 387 (1970) and Robinson v. Neil, 409 U.S. 505 (1973).

The erosion of the dual sovereign doctrine by this line of cases demonstrates the inapplicability of Bartkus and Abbate to the case at bar. Most of the Bartkus opinion, written by Justice Frankfurter, involved a discussion of whether dual prosecution violated general concepts of Due Process of Law. In fact, an appendix to that opinion set forth a chart which compared the constitutional provisions of the states with the Fifth, Sixth and Seventh Amendments of the United States Constitution, in an effort to demonstate that the Fourteenth Amendment was not a short-hand incorporation of the Bill of Rights.

The thrust of the opinion was that the dual sovereign doctrine was not one of those practices which were so "repugnant to the conscience of mankind" as to violate Due Process of Law. This Court held, after a long discussion of this argument:

> With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long,

> unbroken, unquestioned course of impressive adjudication for the Court to rule that due process compels such a bar.

359 U. S. at 136. Yet the holdings in Malloy, Murphy, Benton, Waller and Robinson are necessarily precisely to the contrary since the basis of those decisions is that the concept of Double Jeopardy is included in Due Process of Law. Thus, those decisions impliedly overrule the Frankfurter argument.

Admittedly, the Barkus decision involved the reverse of the state then federal prosecution presented by the case at bar; however, the companion decision in Abbate is premised on the proposition that the Constitution does not prohibit the Federal Government from doing what it does not, according to Bartkus, prohibit the states from doing. To hold otherwise, said the Court in Abbate, would be seriously to erode the power of the Federal Government to prosecute those accused of violating its criminal statutes. Abbate, supra at 195.

The only decision involving the dual sovereign doctrine, since this Court held the Double Jeopardy Clause applicable to the states, is Wheeler v. U.S., 435 U.S. 313 (1978), which involved an indian tribal court prosecution followed by a federal prosecution, rather than

a state/federal or federal/state prosecution. That decision does not involve this issue.

Based on this strong line of precedent eroding the dual sovereign doctrine in the situation presented herein, this Court should hold that the federal prosecution is unconstitutional. See, People v. Cooper, 398 Mich. 450, 247 N.W. 2d 866, 870 (1976).

Finally, this Court should follow the underlying proscriptions of Bartkus and Abbate and hold that this prosecution is unconstitutional because the state and federal interest in the case at bar are identical and because the state prosecution has vindicated all legitimate governmental interest in this prosecution, leaving the Federal Government with no constitutional room for further prosecution. This Court left open this argument in Bartkus and Abbate when it stated that judicial and prosecutorial restraint were essential to the constitutional workings of our federal system. Mr. Justice Frankfurter summarized this position in Bartkus:

> It has more accurately been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that

> separation of powers was adopted in the Constitution "not to promote efficiency but to preclude the exercise of arbitrary power." Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary governme-nt. The greatest self-restraint is necessary when the federal system yields results with which a court is in little sympathy.

359 U.S. at 137-138. Petitioners submit that this Court should follow this language from Bartkus and disallow the instant prosecutions. United States v. Sutton, 363 F. 2d 845 (4th Cir., 1966).

Surely, this is a case with which a court can have little sympathy. The Federal Government had some involvement in, and complete knowledge of, the original investigation and arrests of the Petitioners, yet there was no federal arrest, grand jury investigation or indictment until several months after the conclusion of the state prosecution by guilty plea. The Federal Government, in spite of clear opportunity and in spite of the special South Carolina statutory prohibition against double prosecution, demonstrated absolutely no interest in this case which in any way approached the interest held to be of constitutional concern in Bartkus and Abbate. The

Federal Government took no action until an Assistant United States Attorney, by his own admission, decided that the sentences given the Petitioners, even though they were the maximum alternative sentences available under state law, did not meet the "substantial ends of justice."

This case is not a proper one for dual prosecution. Dissatisfaction with a sentence, especially a maximum alternative sentence, cannot be a proper prosecutorial interest which overrides the restraint urged by this Court in Bartkus and Abbate. On the contrary, this case rises to the extreme posture which this Court warned against in urging and requiring judicial restraint. This case is one in which any legitimate interest of the Federal Government in further prosecution must yield constitutional precedence to the rights of the Petitioners, especially given the Federal Government's original waiver of its right to act. Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971); People v. Cooper, supra; and State v. Hogg, 385 A.2d 844 (N.H., 1978). This case is one where the Double Jeopardy Clause prohibits federal prosecution.

2. DOES AN INTERLOCUTORY APPEAL LIE FROM THE FAILURE OF THE UNITED STATES GOVERNMENT TO FOLLOW THE UNITED STATES JUSTICE DEPARTMENT'S PETITE POLICY?

The Petite Policy was first announced by Attorney General William P. Rogers in a press release dated April 6, 1959. The policy was the result of this Court's decisions in Bartkus and Abbate which, while affirming the dual sovereign rule, stated that the power of dual prosecution should be sparingly employed. The policy seeks to implement the meaning of those decisions. That it has not been consistently enforced has been recognized by at least one commentator, who wrote:

> Six times in the last four years the Solicitor General has confessed error to the Supreme Court and sought to vacate convictions obtained in violation of the policy. In addition, the policy appears to have been contravened by the initiation of prosecution in many other cases. These indications suggest a widespread unfamiliartiy with or disregard for the policy on the part of Government attorneys.

Note, The Petite Policy: An Example of Enlightened Prosecutorial Discretion, 66 Georgetown L.J. 1137, 1143-44 (1978). Such signs are clear proof that interlocutory court review of the dual prosecution issue is urgently needed.

Under the "Petite" Policy, United States Attorneys are forbidden to prosecute any person for allegedly criminal behavior if such behavior was an ingredient of a previous State prosecution. An exception is made only if the Federal prosecution is specifically authorized in advance by the Department itself, upon a finding that the prosecution will serve "compelling interest of federal law enforcement". Thomspon v. U.S. -US-, 100 S.Ct. 512,62 L.Ed. 2nd 456 (1980).

The Court below dismissed this portion of Petitioners' appeal on the ground that it was premature to determine on an interlocutory appeal whether the Justice Department had violated the Petite Policy. Petitioners contend, on the other hand, that such a determination can only be made on an interlocutory appeal since the Petite Policy arises out of the same issues as the Double Jeopardy Clause. To allow a second prosecution and then to determine considerations involving the Petite Policy on normal appeal would in itself constitute a complete vitiation of the appropriate constitutional rights of the Petitioners. This Court has consistently held that an interlocutory appeal will lie in cases involving double jeopardy issues. U. S. v. Wilson, 420 U.S. 332 (1975).

The Assistant United States Attorney was blatant, in fact cavalier, about the lack of prior Justice Department approval of the instant prosecution, stating, in effect, that the Fourth Circuit Court had ignored

Supreme Court decisions regarding the Petite Policy. See, e.g., Petite v. United States, 361 U.S. 529 (1960) and Rinaldi v. United States, 434 U.S. 22 (1977). At the hearing on the Petitioners' Motions to Dismiss, he bluntly revealed his opinion that such prior approval was irrelevant:

> I state for the Court that I intend to proceed whether or not the Justice Department waived the Petine (sic) Doctrine because the Fourth Circuit has said it is merely an administrative, housekeeping remedy.

Such disregard for the Government's own Policy by an agent of the Government and such disregard for Supreme Court decisions is the very reason court review of Petite Policy issues is required.

It was not until April 9, 1979, after the Petitioners were indicted on March 14, that an Assistant Attorney General informed the Assistant United States Attorney by letter of his approval of this prosecution. We submit that this decision came too late. Thompson v. U.S., supra, requires approval in advance.

Aside from the lack of prior approval by the Assistant Attorney General the policy was also violated in that there were no findings of "compelling reason" to dictate

that the Government should prosecute. In Rinaldi, this Court attempted to give some definition to this phrase by approving the following language from Fox v. Ohio, 5 How. 410, 435 (1847):

> It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal systems are administred, an offender who should have suffered the penalties denounced by the one would not be subject to a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity or where the public safety demanded extraordinary rigor.

The fact that a member of the Justice Department "approved" the prosecuton does not comply with the policy. In Rinaldi where it was conceded that the policy was violated, there were specific instructions to prosecute but no findings that the prosecution would serve "compelling interest of federal law enforcement."

If it be found that the letter received by the U. S. Attorney from the Justice Department was a finding of "compelling reasons", it is submitted that such a finding was in error.

The twin cases of Bartkus and Abbate are themselves good examples of circumstances that could be considered "compelling" so as to allow dual prosecutions. In Bartkus, this Court was careful to point out that Illinois had a particular interest in prosecuting the defendant after his federal bank robbery conviction. At note 25 the Court revealed that "(i)f Bartkus was guilty of the crime charged he would be an habitual offender in Illinois and subject to life imprisonment". In like manner, Abbate involved a federal prosecution instituted only because of a unique federal interest in the case. The defendants in Abbate were convicted in Illinois for conspiring to injure property of a telephone company located in Illinois. However, the defendants had at the same time conspired to destroy telephone company property in Mississippi, Tennessee, and Louisiana, such property being part of a communication system operated and controlled by the Government. Clearly the Federal Government had an interest over that of the state of Illinois.

In the instant case there is no corresponding "compelling" federal interest or circumstances of "peculiar enormity". In fact, the crime was investigated and the arrests were made by South Carolina authorities, with the knowledge of the federal authorities, who showed no further interest in the case until after the Petitioners pled guilty in state court and received the maximum alternative sentence allowed by state law. Apparently

the United States Attorney based his decision to seek an indictment on this sentence. As the Assistant United States Attorney put it, "the federal government did not feel that the substantial ends of justice had been met by the proceedings in the State Court." Dissatisfaction with the disposition of a state case ought not be a consideration in determining whether a federal prosecution is proper. See, Rinaldi v. United States, supra (Rehnquist, J., dissenting) and Watts v. U.S., 422 U.S. 1032 (1975). Yet the Assistant United States Attorney advanced no other reason for this dual prosecution.

The Petitioners concede that the courts of appeal have not been receptive to arguments raised by defendants seeking court enforcement of this policy. The Eighth Circuit has concluded that "a criminal defendant has no rights under the internal policy of the Justice Department to limit dual federal-state prosecutions". Delay v. United States, 602 F.2d 173, 178 (8th Cir., 1979). Other circuits have held likewise. See, e.g., United States v. Hutul, 416 F.2d 607 (7th Cir., 1969). Nevertheless, we would urge the Court the adopt a holding in favor of standing to raise the issue. To deny standing to a defendant aggrieved by a violation of the Petite Policy gives the Government unlimited latitude to ignore the admonition of this Court that "(t)he greatest self-restraint is necessary when (the) federal system yields

results with which a court is in little sympathy". Bartkus, supra, at 138. Surely this Court in issuing this warning at the same time that it reaffirmed the dual sovereign rule, intended that the courts, not the Justice Department, would be the ultimate powers to decide whether the guidelines laid down in Bartkus and Abbate were being properly carried out. Without court review as a check on his power, the Attorney General could simply declare that the Federal Government's interest in a given case is "compelling" when in fact it does not differ from the interest previously vindicated in a state prosecution. Likewise, a United States District Attorney could ignore the policy altogether and institute a prosecution in circumstances where a dual prosecution would be oppressive. In such cases both the letter and the spirit of Bartkus and Abbate would be violated.

Petitioners respectfully submit that these exact problems have arisen in the instant case. The Assistant United States Attorney has stated, on the record, his decision to ignore the Petite Policy. Justice Department approval arrived after the fact in a situation where no "compelling" federal interest is apparent. We submit that, consistently with this Court's duty to oversee the criminal justice system to insure its fair administration, the Petitioners should be granted standing to raise the Petite Policy issue. To grant these Petitioners standing is

merely to exercise the constitutional power of this Court. As Mr. Justice Brandeis said in his dissent in Myers v. United States, 272 U.S. 52, 293, the reason for the adoption of the separation of powers principle was "not to promote efficiency but to preclude the exercise of arbitrary power."

Petitioners submit that the interests of both South Carolina and the United States in punishing them are precisely coincidental. A state court judge has exercised his discretion by meting out the maximum possible alternative sentences for the criminal acts to which they had pled guilty. In this manner the interests of both the state and the Federal Government have been vindicated. As a result, the Petite Policy prevents their further prosecution.

As the Pennsylvania Supreme Court stated in Commonwealth v. Mills, 286 A.2d 638, 641:

> It is wrong to harass (a man) with vexatious prosecutions, and wrong to punish him twice for the same offense*** authorities should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense*** a criminal trial should not become an instrument for badgering individuals.

CONCLUSION

This Petition raises issues of fundamental importance under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the related Petite Policy of the Justice Department. It also involves a Double Jeopardy statute of the State of South Carolina. None of these questions have been directly addressed by this Court. Therefore, it is submitted that the questions presented by this Petition are so substantial that a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 79-5213

UNITED STATES OF AMERICA, Appellee

v.

MANUEL ANSELMO CHACON, JR., et al,

Appellants.

ORDER ON MOTION OF THE UNITED STATES FOR SUMMARY AFFIRMANCE

Appellants' appeal from orders of the district court declining to dismiss their indictment on the grounds of double jeopardy and also because of what is called the Petite policy which is that the United States will not prosecute for the same acts following a State prosectuion for those acts absent authority from an Assistant Attorney General of the United States. See United States Attorneys' Manuel, Title 9 - Criminal Division, Paragraph 9-2.142, dated October 20, 1978.

While it is true that interlocutory appeals from orders refusing to dismiss indictments are authorized, see United States v. MacDonald, 435 U. S. 850, 855-856 (1978), we do not believe that rule applies to permit interlocutory appeals for simple violations of departmental policy.

The defendants were convicted in General Sessions Court in Charleston, South Carolina, apparently under the South Carolina conspiracy statute, §44-53-420, for conspiring "for the purpose of importing and distributing approximately twelve tons of marijuana." The federal prosecution is for conspiracy to import a controlled substance, 21 U.S.C. §963; importing that substance, 21 U.S.C. §952; and possessing it with intent to distribute, 21 U.S.C. §841(a)(1).

While there is some argument between the government and the defendants as to whether or not the same acts are the subject of both State and federal prosecutions, for our purposes at this time only, we will consider that they are.

In Abbate v. United States, 359 U.S. 187 (1959), the Supreme Court held that a federal prosecution for the same acts which had previously been prosecuted in the State courts in Illinois was not barred by the double jeopardy clause. The fact that a South Carolina statute, §44-53-410, might bar the prosecution in a State court had a federal prosecution taken place first does not affect the validity of Abbate. We are thus of opinion the district court's order refusing to dismiss the indictment on the ground of double jeopardy was correct.

We do not think, however, that an interlocutory appeal should lie where the question involved is whether or not the department has violated the Petite

policy. Again, there is not agreement between the government and the defendants as to whether the policy was in fact violated. Nevertheless, assuming for our present purposes that it was, we think that question must await an appeal on the merits if the defendants are convicted.

It is accordingly ADJUDGED and ORDERED as follows:

I

The order of the district court refusing to dismiss the indictment on double jeopardy grounds shall be, and it hereby is, affirmed.

II

So far as the appeal concerns a violation of the Petite policy, it shall be, and it hereby is, dismissed as premature.

III

Because the dispositive issues have recently been authoritatively decided and the decisional process would not be aided by it, we dispense with oral argument.

With the concurrences of Judge Hall and Judge Phillips.

S/JUDGE WIDENER
For the Court